Supreme Court, U. S.
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In the Supreme Court of the United States

No. 75-1266

PERPETUAL ROYALTY CORPORATION, a domestic corporation, FERRIN C. HARMAN and HENRY CLAY,
Petitioners,

vs.

DIVERSIFIED MEDICAL INVESTMENTS CORPORATION, a Colorado corporation; and CHROMALLOY AMERICAN CORPORATION, a foreign corporation domesticated in Oklahoma; JOHN E. SCHROYER; DR. CHARLES M. FARR; DR. KENNETH H. BAGWELL; DR. WILLIAM FRIEDMAN; HERBERT ZLOTNICK; and JAMES A. MULLINS, a/k/a JIM MULLINS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the Supreme Court of the United States

No. .....

PERPETUAL ROYALTY CORPORATION, a domestic corporation, FERRIN C. HARMAN and HENRY CLAY,
Petitioners,

vs.

DIVERSIFIED MEDICAL INVESTMENTS CORPORATION, a Colorado corporation; and CHROMALLOY AMERICAN CORPORATION, a foreign corporation domesticated in Oklahoma; JOHN E. SCHROYER; DR. CHARLES M. FARR; DR. KENNETH H. BAGWELL; DR. WILLIAM FRIEDMAN; HERBERT ZLOTNICK; and JAMES A. MULLINS, a/k/a JIM MULLINS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Opinion of the Circuit Court of Appeals for the Tenth Circuit is attached to this Petition in the Appendix and for identification, marked Petitioners' Exhibit A.

The Findings of Fact and Conclusions of Law rendered by the Trial Court are attached hereto in the Appendix and for identification, marked Petitioners' Exhibit B.

The Judgment of the Trial Court rendered by the Honorable Judge Luther Bohanon, Judge of the United States District Court for the Western District of Oklahoma, is attached to the Appendix and marked for identification, Petitioners' Exhibit C.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

The relevant background of this suit is as follows:

The Perpetual Royalty Corporation, hereinafter referred to as Perpetual, was owned by Ferrin C. Harman and Henry Clay. Perpetual is an Oklahoma Corporation, having 80,000 shares of common stock, wholly owned by Petitioners prior to the transaction herein involved. DMIC is a Colorado Corporation, domesticated in the State of Oklahoma, having its home office in Norman, Oklahoma.

Defendants, Farr, Mullins and Bagwell and the defendant, Schroyer, owned stock in a "shell" Colorado corporation, known as Trail Mines, Inc.

An Oklahoma corporation, Brayden, Inc., merged with Trail Mines, Inc., and the name was changed to DMIC, a Colorado Corporation. A trade or transfer was made between the Petitioners and DMIC, in which Perpetual's assets and its 80,000 shares of stock were transferred to DMIC for exchange of 240,000 shares of stock in DMIC. After the transfer, DMIC placed a "stop order" on the future sales of DMIC stock. DMIC represented to Petitioners in this cause that its stock was "free trading" stock, and could be sold on the market and had a value of from $3.00 to $5.00 per share.

After a trial before the Trial Court without a jury, the Court held that there was not a meeting of the minds of the parties, and ordered a rescission, although the parties entered into a written agreement and their minds fully met, and the contract was carried out.

DMIC, as used in this Petition, means Diversified Medical Investments Corporation, and the term, DMIC, is merely used as an abbreviation.

This case went before the United States Court of Appeals for the Tenth Circuit after Judge Chandler, the then trial judge, had sustained a Motion for Summary Judgment. The Opinion of the United States Court of Appeals for the Tenth Circuit was found in 488 Federal Reports 2d Series, beginning on page 111. Thereafter, the case was transferred to Judge Bohanon, United States District Judge, and he entered Findings of Fact on July 3, 1974, which Findings of Fact are attached in the Appendix and identified therein as Exhibit B.

On July 3, 1974, the District Judge also entered a Judgment, based upon the Findings of Fact, a copy of which Judgment is attached to the Appendix and marked, Petitoners' Exhibit C.

Thereafter, the case was appealed to the United States Court of Appeals for the Tenth Circuit and on October 31, 1975, an Opinion was rendered by that Court, which is hereto attached in the Appendix and marked, Petitioners' Exhibit D.

The Citation in the Federal Reports is 524 F.2d 361.

The Petition for Rehearing in the last mentioned case, and in this case being presented, was denied on December 8, 1975.

The Complaint filed in this cause alleged that at a meeting in Norman, Oklahoma, there were one-half, or

approximately one-half, of the shares that were voted were voted by forged proxies, which was in effect admitted.

The record in this case shows an Amended Complaint was filed and it alleges substantially that the defendants, DMIC, Chromalloy American Corporation, John E. Schroyer, a citizen of Colorado, Dr. Charles H. Farr, Dr. Kenneth H. Bagwell, Dr. William Friedman, Herbert Zlotnick and James A. Mullins, a/k/a Jim Mullins, on or about March 3, 1970, and again on or about April 10, 1970, used the U.S. Mails in connection with proxy statements and used devices, schemes and artifices to defraud the Plaintiffs, and committed forgery in violation of Section 10 of the Securities Act of 1934, and Securities and Exchange Commission Rule 10b-5, and common law tort of forgery, and the Plaintiffs further sought relief under Sections 11 (a) (3), 12 (1) (2), 15, 16 and 17 of the Securities Act of 1933.

Plaintiffs allege Defendants, Schroyer and Farr, aided and abetted by other defendants, committed, or in consort with other defendants, committed approximately seventy-five (75) separate acts of forgery, involving the use of the U.S. Mails, a part of an unlawful act, by the use and means and instrumentalities of Interstate Commerce, for the purpose of defrauding.

On or about March 3, 1970, and again on or about April 10, 1970, Defendant Schroyer, aided and abetted, and in consort with other Defendants, as part of their fraudulent course of conduct, prepared, helped prepare and/or caused to be mailed, by the use of the United States Postal facilities, a proxy statement of Defendant DMIC (formerly Trail Mines, Inc.), setting forth therein stockholders meetings for March 13, 1970, and April 20, 1970.

Defendants, Schroyer and Farr, aided and abetted by other Defendants, filed or caused to be filed with the Secretary of State, State of Colorado, on April 17, 1970, by the use of the United States Mails, in interstate commerce, an instrumentality, Articles of Amendments, which purports to do the following:

No. 1 To change the name of the corporation from TRAIL MINES, INC. to: DIVERSIFIED MEDICAL INVESTMENTS CORPORATION.

No. 2 The term of Existence of our said Corporation shall be Perpetual.

No. 3 To change the Board of Directors to not more than nine (9) members.

No. 4 To reduce the outstanding capital stock from fifteen million (15,000,000) shares to three hundred thousand (300,000) shares of one (1¢) cent par value each. Fifteen million (15,000,000) shares authorized.

This recorded instrument further discloses that a stockholders meeting was held on March 13, 1970, and that ten million, two hundred seventy-five thousand, six hundred eighty-two (10,275,682) shares voted for the amendments, and that no shares voted against the amendments.

The Plaintiffs alleged defendant, Chromalloy American Corporation, knew or should have known, of the alleged forgery acts cited herein. That defendant Chromalloy was then, and is now, one of the largest stockholders of defendant DMIC, and acting as such, placed on the Board of Directors of DMIC sufficient number to give them a controlling position. Plaintiffs alleged defendant, Chromalloy, did insert themselves in the management of

DMIC as early as late 1969, and continuing up to the time of the filing of the Amended Complaint. Plaintiffs contended Chromalloy accepted in one transaction some four hundred forty thousand (440,000) shares of DMIC, for which they performed no services, and they knew, or should have known, by the use of ordinary prudence, that the shares they received resulted from common law forgery, as described in preceding paragraphs. There is existing an Agreement between defendant, Chromalloy and Plaintiff DMIC, labeled by Chromalloy and DMIC, as a "Consulting Agreement", but whatever disguise is placed on the Agreement, Plaintiffs believed it served as a controlling Agreement, or if not exercised, a controlling influence.

Your Plaintiffs received 240,000 shares of common stock of DMIC, and Defendants, Farr, Bagwell, Friedman, Zlotnick and Mullins, all directors of DMIC at time of merger with Plaintiff, Perpetual Royalty Corporation, omitted to state said shares were unregistered, and that they resulted from acts of forgery as outlined herein.

In summary and very briefly, DMIC transferred to Harman and Clay, Petitioners, 240,000 shares of DMIC stock for Perpetual and it was then merged into DMIC.

ARGUMENTS AND AUTHORITIES

Arguments and Authorities, which we do not quote on account of the length and space required.

It is impossible in this case as heretofore stated, to place the parties in "status quo", for reasons hereinabove given.

C.J.S., Vol. 17, page 919, Article 438, we quote as follows:

"Restoration of Status Quo"

> "The restoration of the status quo of the parties is, as a general rule, necessary for a rescission of a contract, but absolute and literal restoration is not required if all that is reasonably possible and demanded by the equities of the case is done.
>
> A rescission of a contract demands as a general rule, the restoration of the status quo of the parties. This rule applies to rescission for the various grounds already considered, including fraud or misrepresentation, mistake, duress, intoxication, and breach or failure to perform. A good faith contract made with one of unsound mind, although not adjudicated to be insane, if fair and reasonable, cannot be avoided or rescinded if both parties cannot be put in status quo, but if the contract is made by one who knows of the other's incompetency, restoration of the status quo is unnecessary."

The above quote discussed the necessity of restoring the parties to "status quo".

The Oklahoma Statutes which apply in this case, Title 15, § 233, O.S.A., defines a contract as follows:

"Rescission—Cases when party may rescind.

A party to a contract may rescind the same in the following cases only:

1. If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.

2. If through the fault of the party as to whom he rescinds, the consideration for his obligation fails in whole or in part.

3. If such consideration becomes entirely void from any cause.

4. If such consideration, before it is rendered to him, fails in a material respect, from any cause; or,

5. By consent of all the other parties. R.L. 1910, § 984."

The right to rescind a contract under Oklahoma Law upon a material breach thereof must be exercised promptly, and the Supreme Court of Oklahoma has held that a failure to rescind promptly bars rescission thereafter. See *Fine* v. *H & H Pioneer Savings Stamps Company*, 191 Okl. Rep. 685, 132 P.2d 935.

The Supreme Court of Oklahoma has said substantially that there can be no partial rescission of a contract and it must be either valid or void in toto, and in such latter instance both the parties must be placed in "status quo", see *Berlands, Inc. of Tulsa* v. *Northside Village Shopping Center, Inc.*, 447 P.2d 768. In such case, the Supreme Court held that is is void ab initio, upon a rescission, and the

right of the parties in reference to the subject matter of it, or the same as if no contract had been made. A return of parties to status quo by restoring to each other everything of value received under the contract is required after a rescission of a contract.

It will be noted that under Oklahoma Law it was a legal impossibility in this case to order a rescission, for the reason that neither of the parties could place the other in status quo, and the Petitioners in this case could not return the stock in whole or all of the stock, which they did not have, and the Respondents did not and could not place the Petitioners in "status quo", because they did not have the property which was received from Petitioners in the same condition, and the same amount as was received by them.

Without discussing the matter further, we wish to state to the Court that to grant rescission in this case would be denying to the Petitioners, "due process of law", by reason of the fact that the Oklahoma Law prohibits a rescission, or attempted rescission, of this nature.

The law of Oklahoma requires a party to rescind promptly and we quote, said section being 15 O.S.A. § 235:

"Duty of party attempting rescission—

Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules:

1. *He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and,*

2. *He must restore to the other party everything of value which he has received from him under the*

contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable, or positively refuses to do so. R.L. 1910, § 986." (Emphasis supplied).

The Circuit Court of Appeals in *Appliance Distributors* v. *Mercury Elec. Corp.*, C.A. Okl., 202 F.2d 651 (1953), used substantially this language:

"5. Prompt rescission, necessity of—

Where seller commits breach of contract which will warrant rescission by buyer, buyer is required to act promptly and must offer to return articles received under the contract of purchase."

While I am not quoting the exact words of the Opinion, the Supreme Court of Oklahoma held as shown in the following cases:

"7. Delay in attempting to rescind, effect—

Offer to rescind contract for conveyance of royalty interest in oil and gas lease, made more than 1½ years after learning of alleged fraud, was too late. *Davis* v. *Godwin-Barclay Co.*, 120 Okl. 274, 251 P. 1042 (1927).

If complainant, knowing facts giving him right to rescind deeds, is guilty of unreasonable or unnecessary delay, equity will deny relief. *Nickel* v. *Janda*, 115 Okl. 207, 242 P. 264 (1926).

Under this section, requiring party rescinding to act promptly upon discovering facts, where party to exchange of property did not take legal steps to rescind until nearly two years after discovery of alleged defect in title to property received, and until after oil had been discovered upon land exchanged, she was

not entitled to rescind. *Brown* v. *Privette*, 109 Okl. 1, 234 P. 577 (1925).

Where a buggy was used a year and then returned, it was too late to rescind. *Spaulding Mfg. Co.* v. *Holiday*, 32 Okl. 823, 124 P. 35 (1912)."

The first time rescission was sought by the defendants was in their Answer, which was filed on July 27, 1972, more than two years after the Petition was filed in this case, and which appears on page 8 of their Answer and the last paragraph is as follows:

WHEREFORE, for Counter-Claim herein, these defendants pray that this court of Equity rescind, cancel and extinguish the apparent contract between Harman and Clay and Diversified Medical Investments Corporation; order Harman and Clay to return and restore to Diversified Medical Investments corporation all that Diversified Medical Investments Corporation stock now in their possession, dominion or control; order Diversified Medical Investments Corporation to return and restore to Harman and Clay all Perpetual Royalty Corporation stock in its possession, dominion or control; order the acquisition or so-called "merger" to be set aside and held for naught; order the parties hereto to prepare, execute and file with appropriate agencies of the State of Oklahoma and Colorado and the United States those necessary instruments to finalize and carry out the order of this court, thereby returning the parties to the status quo and order plaintiffs' Complaint and Amended Complaint dismissed, all at the cost of the Plaintiffs and for such other equitable relief as this court deems proper.

We call to the Court's attention the fact that when this case was reversed by the United States Court of Ap-

peals, Tenth Circuit, heretofore cited, it was reversed with directions, which were completely and fully ignored, as we view it, without any reflection upon the trial judge; consequently, since the trial judge in this case did not follow the mandate or direction of the Court of Appeals, Certiorari should be granted, and the trial judge should be required to follow the Opinion of the Appellate Court.

One last thing which we feel the Court should know is that the only witness who testified in this case was Mr. Henry Clay. His testimony was undenied and undisputed, and if believed, which it should have been by virtue of the fact that it was undenied, should allow Petitioners in this case to recover, in accordance with their Petition and Amended Petition.

WHEREFORE, the Petitioners, most respectfully, ask this Court to grant Certiorari in this cause and review this case, and upon a review, to reverse the same and Order a New Trial.

Respectfully submitted,

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400 Investors Capital Bldg.
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Phone: 405/235-5150
Attorney for Petitioners

CERTIFICATE OF MAILING

I, JOHN B. OGDEN, Counsel for Petitioners, do hereby certify that I have this day, the 5th day of March, 1976, duly served a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit on the following Counsel for Respondents:

Robert S. Baker, Attorney for Def. DMIC, Farr and Bagwell
3200 Liberty Tower
Oklahoma City, Okla. 73102.

Robert J. Emery, Attorney for Chromalloy, Friedman, Zlotnick and Mullins
2210 First National Center West
Oklahoma City, Okla. 73102.

Dan A. Rogers, Attorney for Def. Schroyer
117 East 5th Street
Tulsa, Oklahoma 74103.

C. D. Stinchecum, Attorney for Def. Dooley
1408 Midland Center
Oklahoma City, Okla. 73102.

by mailing a true and correct copy thereof to said Counsel for Respondents, on this the 5th day of March, 1976.

JOHN B. OGDEN
Counsel for Petitioners

APPENDIX

EXHIBIT "A"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NOVEMBER, 1973, TERM

No. 73-1299

FERRIN C. HARRELSON and HENRY CLAY,
Plaintiffs-Appellants,

v.

DIVERSIFIED MEDICAL INVESTMENTS CORPORATION, a Colorado corporation; CHROMALLOY AMERICAN CORPORATION, a foreign corporation domesticated in Oklahoma; JOHN E. SCHROYER; DR. CHARLES M. FARR; DR. KENNETH H. BAGWELL, DR. WILLIAM FRIEDMAN; HERBERT ZLOTNICK; and JAMES A. MULLINS, a/k/a Jim Mullins,
Defendants-Appellees.

DIVERSIFIED MEDICAL INVESTMENTS CORPORATION, A Colorado corporation,
Third Party Plaintiff,

v.

DAVID L. DOOLEY,
Third Party Defendant.

Appeal From the United States District Court
for the Western District of Oklahoma
(District Court No. Civ. 71-730)
(Filed November 27, 1973)

John B. Ogden, Oklahoma City, Oklahoma, for Plaintiffs-Appellants.

Robert S. Baker, Oklahoma City, Oklahoma (Dan A. Rogers, Tulsa, Oklahoma, on brief for John E. Schroyer; Robert J. Emery, Oklahoma City, Oklahoma, on brief for Chromalloy, Friedman, Zlotnick and Mullins), for Defendants-Appellees.

Before PHILLIPS, HILL and DOYLE, United States Circuit Judges.

HILL, Circuit Judge.

This appeal results from the dismissal of appellants' complaint and the granting of summary judgment for the defendants on their cross-claim in the United States District Court for the Western District of Oklahoma. After reviewing the submissions included in the record of this diversity case, we conclude that the many factual issues present in this case render the entry of summary judgment inappropriate here.

The record reveals some uncontroverted facts. Appellants Harman and Clay, as the controlling stockholders and managing officers of Perpetual Royalty Corporation, entered into an agreement with Diversified Medical Investments Corporation (DMIC) to transfer all of the outstanding stocks and assets of that company to DMIC in exchange for 240,000 shares of DMIC stock. After the completion of that exchange, DMIC halted trading in these shares by instructing its transfer agent to withhold action on any requests for changes of ownership involving the 240,000 shares in question. As a result, Harman and Clay filed the instant complaint alleging that DMIC and others had represented that the stock they were to receive under this agreement

would be "free-trading" fully marketable stock, and that it would enjoy a specific range of market values. Defendants cross-claimed that as a result of various misrepresentations by the appellants, there had been no meeting of the minds in regard to this contract and requested rescission.

As we have stated as recently as in Ando v. Great Western Sugar Co., 475 F.2d 531 (10th Cir. 1973), no margin exists for the disposition of material factual issues by the use of summary judgment; that procedure cannot serve as a substitute for the trial of cases and does not require the parties to dispose of litigation by the use of affidavits. In reviewing such action by the district court, the pleadings and other documentary evidence are to be construed liberally and in favor of the party opposing such motions. United States v. Diebold, Inc., 369 U.S. 654 (1962). If any issue as to a material fact dispositive of right or duty remains, the case is not ripe for disposition by summary judgment and the parties are entitled to a trial. Fischer Constr. Co. v. Fireman's Fund Ins. Co., 420 F.2d 271 (10th Cir. 1969).

Though findings of fact would appear to be unnecessary in a case that contains no material questions of fact, the district court specifically found that DMIC made no representations of fact concerning the stock to appellants and that no meeting of the minds ever existed in regard to this contract. Both the dismissal of the complaint and the granting of summary judgment must be reversed if these conclusions are controverted by the evidence.

First, the agreement in question was negotiated in large measure by one David Dooley, an officer and director of DMIC. However, the evidence indicates Dooley's true role has yet to be ascertained. He had at least furnished estimates of the value of Perpetual's holdings to other potential buyers previous to these negotiations, and there is

also evidence that he was paid a 40,000 share commission by Harman and Clay to complete the sale to DMIC. Dooley made representations to both the appellants and DMIC during the negotiations, and a factual issue arises as to whose agent he was during such time.

Additionally Clay, in his deposition, testified that Farr, the president of DMIC, and Peterson, an attorney listed as DMIC's securities specialist in a DMIC brochure, both assured him that the stock he was to receive would be fully marketable. Harman, Clay and Dooley indicated that it was understood by both parties that appellants would have to sell portions of this stock to pay the debts of Perpetual so as to transfer the company free of obligations as required by the agreement, although that requirement did not appear in the written agreement in June, 1970. These facts are totally inconsistent with a finding that the agreement included no statements concerning the transferability of this stock.

Further it raises important doubts as to the exact terms of this alleged contract. Originally the parties signed a reorganization agreement in June, 1970. This agreement included a statement that DMIC would assume all the obligations of Perpetual It also included covenants by Harman and Clay that Perpetual owned 25,000 acres of royalties, had a net worth of $250,000, and that they had not agreed to pay any finder's fee in regard to this sale. Harman and Clay indicated that this agreement was later found to be insufficient, and the parties effectuated a statutory merger on much the same basis in December, 1970. Testimony from Harman, Clay and Dooley indicates that it was made clear to DMIC that the true holdings of Perpetual had not been legally determined and that any estimate of those holdings was not guaranteed by Harman or Clay. Thus facts are asserted that would establish a possible later understanding that formed the actual agreement between the parties.

These as well as many other assertions concerning the agreement are evident in the record. Further, the depositions most critical to these facts were taken by defendant Chromalloy American Corporation and not by DMIC. Chromalloy's purpose in taking such testimony was not to discover the true agreement between the parties but only to discover Chromalloy's alleged role in those transactions. As such, the questioning was not calculated to fully present all the assertions of the plaintiffs in regard to representations by other defendants. On such a limited record that nevertheless contained serious disputes as to factual matters, the district court was not justified in taking this drastic summary action.

Therefore the orders of dismissal and summary judgment are hereby VACATED, and the case is REMANDED to the district court for further proceedings consistent herewith.

EXHIBIT "B"

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

No. 71-730-CIV

PERPETUAL ROYALTY CORPORATION, a domestic corporation, FERRIN C. HARMAN, and HENRY CLAY, Plaintiffs,

vs.

DIVERSIFIED MEDICAL INVESTMENTS CORPORATION, a Colorado corporation; and CHROMALLOY AMERICAN CORPORATION, a foreign corporation domesticated in Oklahoma; and JOHN E. SCHROYER; DR. CHARLES M. FARR; DR. KENNETH H. BAGWELL; DR. WILLIAM FRIEDMAN; HERBERT ZLOTNICK; and JAMES A. MULLINS, a/k/a JIM MULLINS, Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed June 3, 1974)

This cause came on for trial before the Court, sitting without a jury, on April 17, 1974. The Court, having considered the pleadings, the stipulations of the parties, the testimony of the witnesses, the documentary evidence submitted and the briefs and arguments of counsel, and being fully advised in the premises, hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Plaintiffs, Perpetual Royalty Corporation (hereafter referred to as Perpetual), Ferrin C. Harman and Henry Clay, seek relief herein alleging damages suffered as a result of the comingling acts of the defendant corporations, Diversified Medical Investments Corporation (hereafter referred to as DMIC) and Chromalloy American Corporation (hereafter referred to as Chromalloy). The officers and directors of DMIC and Chromalloy are joined as defendants under allegations concerning their active and passive conduct. The defendants have made a counterclaim alleging fraud, collusion, and misrepresentation concerning the value of certain assets owned by Perpetual and seek rescission of the transaction between Perpetual and DMIC. The third-party action against David Dooley by DMIC has been dismissed.

2. Perpetual is an Oklahoma corporation, having 80,000 shares of common stock; wholly owned by plaintiffs, Harman and Clay, prior to the transactions between the parties.

3. DMIC is a Colorado corporation, domesticated in the State of Oklahoma, having its home office in Norman, Oklahoma.

4. Defendants, Farr, Mullins and Bagwell were directors of DMIC, and defendant Schroyer held the power of attorney for the majority of the stockholders of a "shell" Colorado corporation, Trail Mines, Inc.

5. In December, 1970, Chromalloy entered into a consulting agreement with DMIC. This agreement was rescinded prior to performance thereunder.

6. An Oklahoma corporation, Brayden, Inc., merged with Trail Mines, Inc., and the name was changed to DMIC,

Colorado corporation. As a result of this merger, DMIC had 300,000 shares of Regulation A stock that is freely tradeable, owned by shareholders not parties to this lawsuit. The balance of DMIC's stock is not subject to a Regulation A registration and is therefore restricted.

7. Plaintiffs and DMIC were brought together by David Dooley; this eventually resulted in a trade of all Perpetual assets for 240,000 shares of the restricted DMIC stock.

8. Plaintiffs and DMIC relied upon representations made by David Dooley as to the value of their respective bargains. The assertions made as to the value of Perpetual's assets were grossly exaggerated. DMIC relied upon those assertions. Both plaintiffs and defendants relied upon Dooley's representations to each as to the value of their respective bargain. Both plaintiffs and defendants were misled.

9. The plaintiffs, Harman and Clay, had agreed to pay David Dooley or his nominee 40,000 shares of DMIC stock out of the 240,000 shares of DMIC stock received by plaintiffs if he would induce DMIC to purchase Perpetual's assets. David Dooley's secretary received 40,000 shares of DMIC stock subsequent to trade of Perpetual's assets for the DMIC stock. Said 40,000 shares have been deposited with the Clerk of the Court.

10. No defendant represented to the plaintiffs that the DMIC stock they would obtain had a specific value or that the stock was freely tradeable. Apparently plaintiffs relied upon the advice of their counsel as to the ability to trade the DMIC stock to be acquired.

11. Plaintiffs received 240,000 shares of DMIC restricted stock. A portion of this stock was sold by plaintiffs. Upon becoming aware of the sale of said stock,

DMIC placed a stop order on the future sales. The balance of the DMIC stock not sold by plaintiffs is on deposit with the Clerk of the Court.

12. DMIC received Perpetual's mineral interests; said mineral interests have been tendered into court.

13. Both plaintiffs and the defendant DMIC made independent value judgments. Each relied on mistakes as to facts which formed the essential elements of the contract.

14. Dr. Farr is the only other defendant aside from DMIC involved in the complained of transaction. Dr. Farr did not assert that the DMIC stock had a value in excess of that shown on the unaudited books furnished to the plaintiffs by David Dooley. He did not assert the stock was freely tradeable.

15. The plaintiffs' representations to DMIC of the net worth and net income of Perpetual were grossly exaggerated. The specific representations were confirmed to DMIC by David Dooley. Plaintiffs represented to DMIC that Perpetual had mineral interests of at least $250,000 and an annual income of between 12,000 and $20,000; when in fact Perpetual had no net worth, liabilities of $60,000 and suffered a loss of income of $25,000 during the year prior to the transaction.

Conclusions of Law

1. Chromalloy was not interested in nor instrumental in the alleged merger agreement between plaintiffs and defendant DMIC; nor did Chromalloy promote said merger agreement in any way.

2. The defendants, Zlotnick, Friedman and Mullins did not furnish information about, know of or participate in the alleged merger agreement between Perpetual and DMIC.

3. Neither Chromalloy, Friedman, Zlotnick or Mullins caused to be published any of the news articles attached as exhibits to the Complaint and introduced into evidence.

4. The defendants, Chromalloy, Friedman, Zlotnick and Mullins, are without fault and judgment should be entered in favor of said defendants.

5. Plaintiffs have never owned any stock in Trail Mines, Inc.; therefore, have no standing to complain of the actions of Schroyer pertaining to the merger of Trail Mines, Inc. and Brayden, Inc. Judgment should be entered in favor of the defendant, Schroyer, against the plaintiffs.

6. Defendants, DMIC, Farr and Bagwell, did not commit fraudulent acts nor make material misrepresentations of facts to the plaintiffs.

7. Plaintiffs and DMIC struck a bargain. Neither received that which was anticipated. There was not a meeting of the minds of the parties as to the material elements of the transaction. There was a bilateral mistake of fact as to the material elements of the transaction.

8. Judgment should be entered in favor of the defendants, DMIC, Farr and Bagwell.

9. Equity demands that the transaction between plaintiffs and DMIC be rescinded, and the parties returned as early as possible to status quo.

An appropriate Order and Judgment will accordingly be entered herein.

Dated this 3rd day of June, 1974.

/s/ Luther Bohanon
United States District Judge

EXHIBIT "C"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 71-730-CIV

PERPETUAL ROYALTY CORPORATION, a domestic corporation, FERRIN C. HARMAN, and HENRY CLAY,
Plaintiffs,

vs.

DIVERSIFIED MEDICAL INVESTMENTS CORPORATION, a Colorado corporation; and CHROMALLOY AMERICAN CORPORATION, a foreign corporation domesticated in Oklahoma; and JOHN E. SCHROYER; DR. CHARLES M. FARR; DR. KENNETH H. BAGWELL; DR. WILLIAM FRIEDMAN; HERBERT ZLOTNICK; and JAMES A. MULLINS, a/k/a JIM MULLINS,
Defendants.

JUDGMENT

(Filed June 3, 1974)

Based upon, and in accordance with the Findings of Fact and Conclusions of Law this day filed,

IT IS ORDERED, ADJUDGED AND DECREED that the defendants Diversified Medical Investments Corporation, Chromalloy American Corporation, John E. Schroyer, Dr. Charles M. Farr, Dr. Kenneth H. Bagwell, Dr. William Friedman, Herbert Zlotnick and James A. Mullins have judgment against the plaintiffs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

1. That the transaction between plaintiffs and Diversified Medical Investments Corporation, which is the subject matter of this cause of action should be, and is hereby rescinded.

2. The Clerk of the Court shall upon proper receipt deliver to DMIC that DMIC stock now on deposit with the Clerk of the Court.

3. Plaintiffs shall deliver to DMIC any additional DMIC stock subject to their custody and control forthwith.

4. DMIC shall have 30 days from this date to file a claim of value as to the unsurrendered DMIC stock, and the plaintiffs shall have thereafter 10 days to respond to such claim.

5. DMIC shall deliver to the plaintiffs the mineral interests in their possession that constitute the assets of Perpetual Royalty Corporation. DMIC shall cooperate and execute those necessary instruments prepared by the plaintiffs' counsel necessary to allow plaintiffs to dispose of Perpetual Royalty Company's mineral interests, if they so elect.

6. This Court retains jurisdiction of this cause to determine all rights and equities between the parties.

Dated this 3rd day of June, 1974.

/s/ Luther Bohanon
United States District Judge

EXHIBIT "D"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1551

FERRIN C. HARMAN and HENRY CLAY,
Plaintiffs-Appellants,

v.

DIVERSIFIED MEDICAL INVESTMENTS CORPORATION, a Colorado corporation; CHROMALLOY AMERICAN CORPORATION, a foreign corporation domesticated in Oklahoma; JOHN E. SCHROYER, DR. CHARLES M. FARR; DR. KENNETH H. BAGWELL; DR. WILLIAM FRIEDMAN; HERBERT ZLOTNICK; and JAMES A. MULLINS, a/k/a Jim Mullins,
Defendants-Appellees.

Appeal From the United States District Court
for the Western District of Oklahoma
(D. C. No. Civil 71-730)
(Filed October 31, 1975)

John B. Ogden, Oklahoma City, Oklahoma, for Plaintiffs-Appellants.

Dan A. Rogers, Tulsa, Oklahoma, for Defendant-Appellee John E. Schroyer; Robert S. Baker, Oklahoma City, Oklahoma, for Defendants-Appellees Diversified Medical Investments Corporation, Dr. Charles M. Farr, and Dr. Kenneth H. Bagwell; Robert J. Emery, Oklahoma

City, Oklahoma, for Defendants-Appellees Chromalloy American Corporation, Dr. William Friedman, Herbert Zlotnick, and James A. Mullins, a/k/a Jim Mullins.

Before HILL, HOLLOWAY and BARRETT, United States Circuit Judges.

HILL, Circuit Judge

Ferrin Harman and Henry Clay (hereinafter referred to collectively as appellants) were the majority stockholders in, and the managing officers of, Perpetual Royalty Corporation (Perpetual), an Oklahoma corporation dealing in oil and gas royalties.[1]

On or about April 17, 1970, Trail Mines, Inc. (Trail Mines), a Colorado corporation, amended its Articles of Incorporation by changing its corporate name to Diversified Medical Investments Corporation (DMIC) and also underwent a recapitalization whereby its 15,000,000 outstanding shares of stock were reduced to 300,000 outstanding shares of stock.

Thereafter, on May 15, 1970, The Brayden Company, Inc. (Brayden), an Oklahoma corporation, was merged into DMIC. Through this merger the former stockholders of Brayden received an aggregate sum of 5,000,000 shares of DMIC stock in exchange for all of Brayden's corporate assets.

As a result of this activity, DMIC had 300,000 shares of Regulation A stock that was freely tradeable. The balance of its stock was not subject to Regulation A exemption and was therefore restricted.

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1. Of Perpetual's 80,000 shares of stock, appellants each owned 39,900. The remaining 200 shares were owned in equal amounts by two persons not parties to the instant case.

Appellees Charles Farr, Jim Mullins, Kenneth Bagwell, William Friedman and Herbert Zlotnick were directors of DMIC. Appellee John Schroyer held the power of attorney for the majority of Trail Mines' stockholders.

Chromalloy American Corporation (Chromalloy) did, in December, 1970, enter into a consulting agreement with DMIC. This agreement, however, was rescinded prior to performance thereunder.

David Dooley is a petroleum engineer. He was, at one time, employed by Perpetual and later was employed by Brayden. When Brayden merged into DMIC, he became an officer and director of DMIC. Dooley brought appellants and DMIC together, for the purpose of selling Perpetual's assets to DMIC.[2] Dooley made various representations to both DMIC and appellants as to the value of their respective bargains, and appellants and DMIC relied upon these assertions. The negotiations eventually resulted in the sale of Perpetual's stock and assets to DMIC in exchange for 240,000 shares of DMIC stock. Of this stock, appellants agreed to pay Dooley 40,000 shares if he would induce DMIC to purchase Perpetual's assets. This stock, however, was assigned to Dooley's secretary.

Appellants sold a portion of the stock they received from DMIC. All the stock they received was restricted but apparently did not bear a restrictive legend. Upon learning of sales by appellants of its restricted stock, DMIC placed stop orders on future sales.

On November 19, 1971, appellants and Perpetual filed a complaint in the United States District Court for the Western District of Oklahoma against, *inter alia*, DMIC and Chromalloy. The complaint claimed jurisdiction under

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2. While working for Perpetual, one of Dooley's assigned tasks had been to attempt to sell Perpetual.

15 U.S.C. §§ 77a *et seq.*,[3] and alleged, *inter alia*, that DMIC and others had represented that the stock to be received under the agreement of merger was to be "free trading" and "fully marketable" stock which could be sold on the market without restrictions and would enjoy a specific range of values. The appellees cross-claimed that as a result of various misrepresentations by the appellants there had been no meeting of the minds in this regard. Perpetual was ordered dismissed by the court following an agreement to that effect by the parties. Thereafter, the trial court granted summary judgment on behalf of DMIC, Farr and Bagwell and dismissed the action as to Chromalloy, Shroyer, Zlotnick, Friedman, Mullins and Dooley. Finding that genuine issues of material fact existed, we reversed. *See* Harman v. Diversified Medical Invs. Corp., 488 F.2d 111 (10th Cir. 1973).

Following remand, a brief trial to the court was held, the trial court admitted into evidence all depositions, interrogatories and answers, and exhibits, subject to relevancy and competency objections. One witness, appellant Clay, gave some testimony. A stipulation was entered that appellants' counsel could find someone in Oklahoma County who would testify that the proxies—voted to approve the April 17, 1970, amendments to Trail Mines' Articles—were all signed by the same person.

The trial court entered findings of fact and conclusions of law. We set forth the critical ones as follows.

> Plaintiffs and DMIC relied upon representations made by David Dooley as to the value of their respective bargains. The assertions made as to the value

3. By an amended complaint, appellants alleged jurisdiction was under 28 U.S.C. § 1337, 15 U.S.C. §§ 77l, 77p, 77v and 78aa. Other sections of the securities laws were alleged as conferring "jurisdiction" for the recovering of damages and jurisdiction over the persons via extraterritorial service of process.

> of Perpetual's assets were grossly exaggerated. DMIC relied upon those assertions. Both plaintiffs and defendants relied upon Dooley's representations to each as to the value of their respective bargain (sic). Both plaintiffs and defendants were misled. [Finding of Fact]
>
> Both plaintiffs and defendant DMIC made independent value judgments. Each relied on mistakes as to facts which formed the essential elements of the contract. [Finding of Fact]
>
> Plaintiffs and DMIC struck a bargain. Neither received that which was anticipated. There was not a meeting of the minds of the parties as to the material elements of the transaction. [Conclusion of Law]

The court rescinded the transaction between appellants and DMIC. DMIC was given 30 days to file a claim for the unsurrendered stock; appellants were given ten days following the claim's filing to respond. DMIC was ordered to deliver to appellants the assets of Perpetual which were in their possession. DMIC was also ordered to cooperate and execute the necessary instruments prepared by appellants' counsel which would allow the two men to dispose of Perpetual's mineral interests, if the two men elected to do that. The claim filed by DMIC represents that 124,200 of the 240,000 shares of DMIC stock had been deposited with the court; the claim valued the remaining 115,800 shares at $5,558.40.

On appeal, appellants' principal argument is that the trial court erred in ordering a rescission because the parties could not be placed in the same position they were in when they entered into the transaction. The specific allegations of this argument include: (1) appellants cannot return all the stock because some of it is beyond their

control; (2) it is impossible to give title to the Perpetual assets back to the corporation because Perpetual has ceased to exist; (3) DMIC is insolvent and the judgments which have been rendered against DMIC have created liens on the Perpetual assets; (4) if the property is transferred to appellants individually, it would be necessary that it be transferred by DMIC which cannot legally transfer the property; and (5) Bache & Company sold some stock for appellants and was forced to redeem it because of a stop-order issued by DMIC's president; Bache & Company sued Clay and received a $13,000 judgment ("or thereabouts"); to rescind, DMIC should be required to pay that judgment.

The general rule is that a person seeking rescission must restore the other person as far as possible to the situation he occupied before the transaction in issue occurred. Berland's Inc. v. Northside Village Shopping Center, 447 P.2d 768 (Okla. 1968); 12 C.J.S. *Cancellation of Instruments* § 44 (1938); 13 Am.Jur.2d *Cancellation of Instruments* § 37 (1964). Appellants seek the literal application of this rule by arguing the property *in specie* must be returnable or rescission cannot be granted. Although appellants are to receive the property *in specie* they exchanged, they are concerned that DMIC will not be receiving all of its stock. DMIC has not objected to the change in form: stock into money. The general rule cited above seeks to avoid one party's retaining benefits while the other party returns the property in its possession. Courts have recognized that the restoration need not be exact for rescission to be proper. 12 C.J.S., *supra*.

In a rescission case involving oil leases, the Oklahoma Supreme Court, noting that wells had been drilled since the transaction and leases could not be returned to the former owner, stated:

> Therefore, the very nature of the properties involved rendered it impossible for the plaintiff to be restored to its former condition. In addition, the nature of the acts of fraud committed by the plaintiff contributed to the inability of the defendants to restore the status quo. . . . To impose an impossible condition such as this on the defendants as a condition precedent to rescission would be grossly unfair and inequitable and would have the effect of reducing this equitable remedy to an arithmetic formula which would drastically limit its availability. All that can reasonably or in justice be required in cases such as this is that the person seeking rescission reimburse the other party for all benefits they may have received.

Oklahoma Co. v. O'Neil, 440 P.2d 978 (Okla. 1968).

We see nothing unjust or inequitable in allowing rescission in this instance although the property in its original form will not be exchanged.

Appellants' second attack on this rescission is that the status quo will not be achieved because title to the assets cannot be placed in Perpetual as that company no longer exists. Perpetual apparently was merged into DMIC, although the trial court did not make a specific finding as to merger or mere acquisition of Perpetual.[4] If merger occurred, as we assume for purposes of this appeal, Perpetual no longer exists and title could not be returned to it. Colo. Rev. Stat. Ann. § 7-25-105 (1973); Okla. Stat. Ann., Tit. 18, § 1.167 (1953) (the appropriate statutes of the two states where the companies involved in the merger were incorporated). There is nothing inherently inequitable in simply returning to appellants, in

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4. There is evidence that DMIC merely acquired Perpetual; however, Articles of Merger were filed with the appropriate authorities.

their individual capacities, the assets owned by Perpetual. The appellants have received the real value they exchanged and form should not be regarded over substance in this equitable matter.[5] Ionic Petroleum, Ltd. v. Third Fin. Corp., 411 P.2d 492 (Okla. 1966) (rescission is controlled by equitable principles); 27 Am. Jur. 2d *Equity* § 127 (1966).

Appellants also contend DMIC is insolvent and liens on behalf of DMIC's creditors have attached to the Perpetual assets. The only support for this contention is the same conclusory argument in appellants' brief in support of their new trial motion. Because there is no factual basis in the record for that contention and no supporting legal authorities, we deem it inappropriate for review. Appellants' fourth contention, that DMIC cannot legally transfer the property to appellants, also is not supported factually and is not reviewable.

To understand appellants' fifth argument against the propriety of rescission, we recite the relevant facts, as appellant Clay testified at trial. Clay sold approximately 6,100 shares of DMIC stock to Bache & Company. He received an average of $2.76 per share. Of those shares, 4,700 were sold but could not be transferred due to the stop orders which DMIC had placed with the transfer agent of the securities. Bache had to go into the market and buy up shares to satisfy the purchasers of the non-transferrable shares. Bache was awarded a judgment against Clay for "13,000 and something." Clay agreed in his testimony that he had realized $12-15,000 on the trans-

5. The trial court did not order the merger set aside as appellees requested in their counter-claim (we do not infer that such action would have been possible); the court also made no disposition of the Perpetual stock exchanged by appellants for the DMIC stock. This latter failure may have recognized the fact that Perpetual had ceased to exist. Appellants, however, have not complained that their stock has not been returned to them or that they have not been returned the corporation they owned.

action.[6] We cannot agree with appellants that this judgment must be paid by DMIC to achieve the original status quo. The proof adduced would not indicate that Clay has anything to complain about concerning his position resulting from his disposal of the stock.

Appellants also argued the rescission was not proper because it was not sought promptly. This issue was not presented in any manner to the trial court and is not appropriate for appellate review. *E.g.*, Eureka-Carlisle Co. v. Rottman, 398 F.2d 1015 (10th Cir. 1968).

Appellants contend rescission is not authorized in this situation under Oklahoma law, the law the parties have both applied to consideration of the counter-claim. Okla. Stat. Ann., Tit. 15, § 233 (1966), provides that a party to a contract may rescind when his consent was given by mistake. The Oklahoma Supreme Court has recognized the power of a court of equity to cancel a contract for mutual mistake of fact. Watkins v. Grady County Soil & Water Conservation Dist., 438 P.2d 491 (Okla. 1968). The trial court concluded that a meeting of the minds had not occurred as to material elements of the transaction and that there was a bilateral mistake of fact as to the material elements of the transaction. We believe under these circumstances Oklahoma courts and most other courts would allow rescission. 12 C.J.S. *Cancellation of Instruments* § 27 (1938).

Appellants argue that the evidence presented at the trial compels a determination that forged proxies were voted at a Trail Mines stockholders' meeting held on March 13, 1970, when the amendments to its Articles were approved (appellants say half the proxies were forged). These amendments changed the corporation's name to

6. One exhibit indicated Clay received $13,052.22 net on his sales of stock to Bache.

DMIC and reduced the outstanding capital stock to 300,000 shares and authorized 15,000,000 shares. The minutes of that meeting also reflect approval of the plan of merger between Trail Mines and Brayden. At trial, it was stipulated that appellants' counsel would be able to find someone in Oklahoma County who would testify the proxies were all signed by the same person. As the trial court correctly informed counsel the stipulation was not made that such testimony was true.

We assume for purposes of this appeal that forgeries were used to secure many proxies. Appellants contend that these forgeries invalidated the issuance of DMIC stock and made the stock issued to Harman and Clay void. The trial court did not make findings concerning this matter. The trial court did enter a conclusion of law respecting the alleged major culprit in the forgeries, appellee John Schroyer. That conclusion is as follows:

> Plaintiffs have never owned any stock in Trail Mines, Inc.; therefore, have no standing to complain of the actions of Schroyer pertaining to the merger of Trail Mines, Inc. and Brayden, Inc.

We agree with the trial court that these alleged forgeries are not the concern of these appellants. The court's order rescinding the sale certainly gives relief to these parties from any defect in the stock's issuance.

In relation to the alleged forgeries of proxies, appellants contend they are purchasers and sellers of stock within the securities laws, which appellants claim have been violated; appellee Schroyer argues appellants do not fit within the definition of purchasers and sellers in relation to possible forged proxies for the voting of Trail Mines' stock. Although there are many reasons which could be marshalled to support the result—giving judgment to

Schroyer against appellants—we rely on the lack of a causal connection between Schroyer's alleged forgery activities and the alleged deceptive exchange of DMIC stock for the Perpetual stock. *See* Vincent v. Moench, 473 F.2d 430 (10th Cir. 1973).

We have considered appellants' other objections to the judgment below, including the argument concerning the nonlegend restriction of the stock. We find those arguments to be without merit especially in light of the rescissional remedy granted here. The trial court found that appellants and DMIC had relied upon Dooley's representations as to the value of their respective bargains and that appellants and DMIC had been misled. The trial court sought to do equity in a complicated situation where all parties claimed to have been misled as to material facts. Rescission was properly granted as the parties have been substantially returned to the status quo.

AFFIRMED.